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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 492

WALTER W. FLORA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR WALTER W. FLORA, PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals (R. 14-18) is reported in 246 F. 2d 929. The memorandum of the trial judge (R. 6-9) is reported in 142 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals was entered July 1, 1957 (R. 18). On November 25, 1957 order granting the petition for certiorari was entered and the case transferred to the summary calendar. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the United States District Court has jurisdiction of a tax refund suit when the taxpayer has not paid his entire income tax for the year involved as assessed by the Commissioner of Internal Revenue.

STATUTES INVOLVED

28 U.S.C. sec. 1346 (as amended by Sec. 1 of Act of July 30, 1954, c. 648, 68 Stat. 589), insofar as pertinent, provides as follows:

> Sec. 1346. *United States as defendant*
>
> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws; * * *

Section 7422(a) of the Internal Revenue Code of 1954, (Act of August 16, 1954, c. 736, 68A Stat. 876), provides in part that:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate; * * *

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IN THE

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OCTOBER TERM, 1957

No. 492

WALTER W. FLORA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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STATEMENT

Petitioner suffered losses in transactions involving the purchase and sale of commodities and commodity futures during the year 1950. These losses were reported as ordinary losses but this was disallowed by the Internal Revenue Service, resulting in an addition to the income of petitioner of $42,608.05 and additional tax, plus interest, in the amount of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Petitioner paid a total of $5,058.54 on these assessments and filed a claim for refund. Upon its disallowance this suit followed. (R. 1-4)

The United States included in its answer a defense that the court was without jurisdiction of the cause since petitioner had not paid the entire amount of income taxes for 1950. This defense was heard separately prior to trial and overruled. (R. 5) In its opinion of July 24, 1956, the court reviewed this question (R. 6-9) and stated that the petitioner should not maintain the suit since he had not paid the entire tax assessment. (R. 9) However, in view of what the court considered a conflict between decisions of the Third and Eighth Circuits and since the Court of Appeals for the Tenth Circuit has not passed on the question, it considered the merits of the case. Findings and conclusions were entered in favor of the United States upon both the complaint and counterclaim (R. 9-12) and judgment was entered against the taxpayer and in favor of the United States on its counterclaim. (R. 12-13)

Jurisdiction of the United States District Court in the first instance is predicated upon section 1346 of 28 U.S.C., and it is contended that the suit is one to recover an internal revenue tax erroneously and illegally assessed and collected, or a sum of money which was wrongfully collected under the internal revenue laws. The Court of

Appeals rejected this contention and held that the District Court was without jurisdiction and remanded the cause with directions to vacate the judgment for the government upon its counterclaim and to dismiss the action without prejudice. (R. 18-19).

SUMMARY OF ARGUMENT

The decision attacked in this Court holds that before a taxpayer may bring a suit in the district court to recover taxes alleged to have been erroneously or wrongfully assessed or collected he must have paid the whole tax as assessed. We submit that this decision is erroneous for the following reasons:

I. The decision is contrary to the plain provisions of the applicable statutes. The statute specifically says that an action may be maintained for any tax or any sum. The effect of the decision of the court below is to read something into the statute that is not there upon any reasonable construction thereof.

II. The decision is based upon an erroneous and improper interpretation of the previous decisions of this Court. This Court has not had before it the question as to whether it is necessary to pay the full amount of the assessed tax before suit can be maintained in the district courts to recover an amount paid and claimed to have been erroneously and wrongfully assessed and collected. The question is therefore one of first impression.

III. The applicable statutes should be given a liberal interpretation in favor of the taxpayer. Insofar as it is consistent with governmental policy and proper enforcement of the internal revenue laws, statutes rendering the sovereign amenable to suits in courts of general jurisdiction readily accessible to the citizen should receive a liberal construction to the end that judicial review of administra-

tive action be a real right and not a mere fiction, available to the small taxpayer as well as the large.

IV. The enactment of the statute creating a right of appeal to the Tax Court without payment of the tax and the legislative history of that law do not require the restrictive interpretation upon the statutory right of suit placed upon such right by the court below. Hardships recognized as the basis for the creation of such additional remedy existed as much under our construction of the laws as under the government's.

ARGUMENT

I

The decision is contrary to the plain provisions of applicable statutes

There is nothing in the provisions of Section 1346(a)(1) which states that a suit can be maintained in the district court only if the whole tax as assessed has been paid. The statute permits suit for the recovery of "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," or "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." If a taxpayer, under threat of summary proceedings to collect a tax, has paid a part thereof, it seems rather plainly to follow that the amount so paid represents either a tax or a sum wrongfully, erroneously or illegally assessed if there was no legal basis for the assessment. It would have been an easy matter for Congress, if it considered that payment of the whole tax as assessed was a prerequisite to suit, to have said so plainly. The court below has therefore read something into the statute that was not placed there by Congress.

The decision of the court below is in direct conflict

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with the recent decision of the Court of Appeals for the Eighth Circuit in *Bushmiaer v. United States*, 230 F. 2d. 146. In that case, exactly as in this, the taxpayer had paid a part only of the deficiency assessment against him, then filed claim for refund of the amount so paid and upon its rejection filed suit in the District Court for the amount so paid. The District Court dismissed the suit for want of jurisdiction. The Court of Appeals reversed, one judge dissenting, saying:

> (p. 149) "In view of the positive, plain and unambiguous provisions of the Tucker Act as amended in 1954 we cannot escape the conviction that the District Court had jurisdiction of the present action. * * *
>
> "* * * In the final analysis the ultimate question requiring determination in the instant case is whether plaintiffs regardless of how exhorbitant, unjust or illegal the additional assessment might be are required to pay the full amount of such assessment as a condition precedent to the right to invoke the jurisdiction of the District Court in an action to recover a refund. * * * *"

The decision is also in conflict with the plain language of the decision of the Court of Appeals of the Second Circuit in the case of *Coates v. United States*, 111 F. 2d 609. In that case plaintiff started his action without payment of the full tax but prior to its determination had paid the full amount. The government urged lack of jurisdiction because the full amount had not been paid when the suit was brought.

Perhaps it was not necessary for the Court of Appeals to dispose of it on the ground it did but notwithstanding the payment of the full tax the government was still asserting lack of jurisdiction. The court said:

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(p. 610) "It is pressing technicality beyond all bounds to say that a taxpayer who has made a return on an excessive basis and has paid installments which are more than the correct amount of tax before discovering his error, must pay the remaining installments indicated by the incorrect return on pain of losing his remedy to recover overpayment. The proposition has neither reason nor authority in its favor. We reject the jurisdictional point and pass on to the merits."

II

The decision is based upon an erroneous and improper interpretation of previous decisions of this Court

On page 2 of the opinion, 246 F. 2d 930, we find this statement:

"Beginning with the comments of Mr. Justice Miller in *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561, and continuing through many decisions, the Supreme Court has consistently indicated that *full* payment of a tax deficiency is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system." (Emphasis added)

It is respectfully submitted that at no time has this Court had before it for consideration the question as to whether the full tax as assessed must be paid. In the *Cheatham* case the full tax had been paid and the question before the court was only as to the time when limitations began to run against the maintenance of the suit to recover. Of the other cases cited by the court below, *Savings Institution v. Blair*, 116 U. S. 200, held that suit to recover could not be brought unless claim therefor had been filed within time fixed by law and *Dodge v. Osborn*, 240 U. S. 118, and *Graham v. DuPont*, 262 U. S. 234, held that injunction against collection of the tax would not lie. *United States v. Jefferson Electric Co.*, 291 U. S. 386, was a suit

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to recover and there was no question but that the full amount had been paid. *Dobson v. Commissioner*, 320 U. S. 489, had come up through the Tax Court so no question of the amount of payment was involved.

Phillips v. Commissioner, 283 U. S. 589, points out that two methods are available to the taxpayer in only one of which, appeal to the Tax Court, may the taxpayer avoid summary proceedings to collect the tax and even in such case the Commissioner may make jeopardy assessment and collect by distraint unless the taxpayer filed a bond. Of the tax payment method the court says:

> "He may contest his liability by bringing an action, either against the United States or the Collector to recover the *amount* paid." (Emphasis added)

This case is also interesting in pointing out in a note, p. 596, that by the establishment of the Tax Court, "the paramount right of the United States to require immediate payment, or surety therefor, is not diminished."

The case of *Sulix v. United States*, 18 F. 2d 81 (CA 3), was considered by the District Judge to be in conflict with the *Bushmiaer* case. In that case we find the following statement:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. *Blair v. Birkenstock*, supra."

Blair v. Birkenstock, 271 U. S. 348, cited as authority for the proposition stated, does not sustain the point. The only question in the case was the date from which and to which interest should be allowed.

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Brown, *Refund Suits Against Collectors*, 28 Taxes 937 (1950)	11
3 Casey, *Federal Tax Practice* § 11.5 (1955)	10
54 Harv. L. Rev. 1404 (1941)	11
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3 Rabkin and Johnsan, *Federal Income, Gift and Estate Taxation* § 72.04(6)	10
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III

The applicable statutes should be given a liberal interpretation in favor of the taxpayer

Both Congressional enactments and decisions of this Court express the doctrine that injunction against the collection of a tax will not be permitted nor may the taxpayer secure a declaratory judgment as to his liability to pay a deficiency assessment. Implicit in the decision of the court below is a strong feeling that the maintenance of a suit of this kind, without full payment of the tax, is a method of obtaining a judicial determination of the liability without having made payment and therefore an evasion of the rule that courts will not interfere with the collection of taxes in the first instance. The court is of the view that contest before payment can be allowed only by strict adherence to the procedure permitting appeal to the Tax Court.

As has been held by this Court, *Phillips v. Commissioner*, supra, the only way in which the taxpayer can avoid summary proceedings to collect the tax assessed against him, however, illegal it may be, is by appeal to the Tax Court. The deficiency assessment in this case was made March 10, 1952, and the right of appeal to the Tax Court expired 90 days thereafter. The two payments made by petitioner were in March and June of 1953 and suit to recover was filed August 3, 1956. (R. 3-4). When petitioner failed to take appeal from the Commissioner's decision he subjected himself to summary proceedings to collect the deficiency. This situation has continued since June of 1952.

It is apparent therefore that not one thing the taxpayer has done in this case has operated to thwart the government in the admittedly important function of tax collection. Unless it might be a lack of funds or property

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REPLY BRIEF FOR PETITIONER

Introduction

The words of the jurisdictional statute in question are broad and all-inclusive. The Government admits that their "literal meaning" authorizes the present suit (Br. 8).

The taxpayer filed a claim for refund in accordance with the law and regulations. Upon its rejection, he had two years within which to sue, and he brought suit within such period. The Government would have this Court hold that the suit was premature. If the suit were brought more than two years after rejection, it would clearly be too late.

with which to pay the tax, the taxpayer has done nothing in any way seeking to limit the right of the government to enforce its tax claim. The filing of this suit could not so operate and if during the pendency thereof the government sought to enforce its collection rights in a summary way, no legal remedy could have issued from the District Court restraining or interfering with that collection.

On the other hand, if petitioner in this case is without remedy by suit to recover the part of the tax that he has paid, there exists a field where the taxpayer is denied access to the regularly constituted courts of general jurisdiction. A taxpayer without funds to pay the entire tax and without the financial standing to procure a bond might take an appeal to the Tax Court without paying the tax (subject always to possible jeopardy assessment) but his right to appeal to the Court of Appeals to secure a review of the assessment is subject to posting a bond. Sec. 7485 Int. Rev. Code 1954, 26 U.S.C.A. sec. 7485. The financially hard pressed taxpayer, is therefore effectively denied a complete remedy permitted a taxpayer in good financial condition. Moreover, a taxpayer who has not discovered the possible illegality or error of the imposed deficiency until he has made some payment or after time for appeal to the Tax Court has expired and who does not have the funds with which to pay the whole tax will find himself completely without redress and without the means of recovering the amount illegally exacted from him.

It is not intended by this discussion to inject any issue of lack of due process in the assessment of the tax. But if there is one construction of the statute that permits the government to collect its taxes without interference and at the same time preserves a complete right to litigate the issue and take an appeal in accordance with general legal principles, that construction certainly should be favored

To support the decision below, the Government would read into related statutes an intent on the part of Congress to provide with respect to the same cause of action both that the taxpayer may not sue and that he must sue to prevent the statute from running against him.

The Government's entire argument is grounded upon unsupportable assumptions that maintenance of the present suit in some way restrains collection of the balance of the assessment. It relies upon general statements by this Court which do not refer even remotely to the issue involved in this case. It disregards long-standing decisions squarely upholding jurisdiction in such cases. It, moreover, completely misinterprets the significance of Section 7422(e) of the Internal Revenue Code of 1954, which recognizes that a taxpayer may maintain a suit for refund of tax where it results in adjudication of the Commissioner's claim for an unpaid deficiency.

ARGUMENT

1. In urging this Court to depart from the literal meaning of the jurisdictional statute, the Government overlooks the import of the related statutory provisions regarding refunds.

The Government admits that the literal meaning of the terms of the statute supports jurisdiction in this case. 28 U.S.C. § 1346(a), as amended, 68 Stat. 689 (1954). It urges, nevertheless, that petitioner disregards "the settled and salutary rule that the literal meaning of statutory words yields to legislative policy and purpose" (Br. 8).[1]

[1] Regarding statutory construction, this Court stated in *United States v. Sullivan*, 332 U.S. 689, 693: "And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning." See also *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32, as quoted in taxpayer's original brief (Br. 11).

over one that will result in a drastic limitation of the taxpayer's remedies. Mr. Justice Holmes, in *United States v. Emery Bird, Thayer Realty Company*, 237 U. S. 28, rejected an argument concerning jurisdiction resting upon the "inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." This Court, in *United States v. Shaw*, 309 U. S. 495, 501 has said:

> "As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen . . . When authority is given, it is liberally construed."

Unless, therefore, there are considerations of the greatest weight dictating such adverse construction, the construction given the statute by this Court should be liberal. Practical considerations and taxing policy were advanced to the court in the case of *Hanchett v. Shaughnessy*, (D.C.N.D.N.Y.), 126 F. Supp. 770, as the basis for denying jurisdiction in an essentially similar situation. Reference was made to section 3772 of Title 26 of the Code, (now section 7422 of the Internal Revenue Code, quoted above and in the opinion of the court below) and it was contended that that statute required payment of the full amount of tax before the action could be brought. The court held that the conditions were concerned with the filing of the claim rather than the payment of the tax, upon which the right to maintain the action depends.

> "The section by its language contemplates an action to recover '* * * any sum alleged to have been excessive or in any manner wrongfully collected. * * *' The cause of action would seem to have ripened when 'any sum' has been wrongfully collected. Its maintenance is deferred until the prescribed conditions are met."

The Government had no choice but to admit that the provisions of Section 1346(a) on their face are plain and clear. The language of the statute is broad and all-inclusive in describing the action as one for the recovery of "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . ." It is difficult to conceive of language that might be added to broaden this description. The argument that these words mean "the entire deficiency" (Br. 8, 20) misconceives the nature of a suit for refund which is brought to recover, not a deficiency, but an *overpayment* of tax. The question whether there is an unpaid deficiency or an overpayment of tax "involves the merits, not the jurisdiction." *Coates* v. *United States*, 111 F. 2d 609, 610 (2d Cir.).

Despite its assertion that the precise question involves a construction of the terms "any internal-revenue tax" and "any sum," the Government itself points out that this particular language was added to the statute in 1921 in an amendment which removed the $10,000 jurisdictional limitation from tax cases where the Collector was dead and admits that this amendment was not intended to make any other change (Br. 10). Prior to the 1921 amendment, the jurisdiction of district courts in tax cases rested upon the general authorization in the Tucker Act extending to "all claims . . . founded upon the Constitution of the United States or any law of Congress . . . ."[2] Since the statute prior to 1921 obviously contained no restrictions of the sort urged by the Government, and the 1921 amendment admittedly was intended to add none, it is appropriate

[2] Tucker Act §§ 1, 2, 24 Stat. 505 (1887), as amended by Judicial Code § 24, 36 Stat. 1087 (1911). *United States* v. *Emery, Bird, Thayer Realty Co.*, *supra*.

This decision reads the statute as a whole and gives effect to it as a whole. We can see no reason why this Court should not give a similarly liberal construction to the grant of jurisdiction to the district courts. No important policy of government will thereby be jeopardized and there will be no interference with the important function of tax collection. Such interference can not follow because, regardless of the pendency of a suit of this kind, the Commissioner still has the power of summary collection of the tax.

IV

The enactment of the statute giving the right of appeal to the Tax Court does not require the restrictive interpretation placed on the right of suit in the district court imposed by the court below

The court below was strongly impressed with the government's argument that the enactment of legislation creating the Board of Tax Appeals, now the Tax Court, demonstrates that Congress considered payment of the *whole* tax a necessary prerequisite to the commencement of suit for refund. Reference is made to reports of the Congressional committees considering the legislation (246 F. 2d 931), which emphasized the hardship to the taxpayer under existing law and the necessity for a procedure that would permit an appeal and review of the Commissioner's action before payment of the tax. The government and court argue that Congress found that the taxpayer was placed in an inequitable position by the doctrine of payment before litigation. It is then argued that no hardship or inequity would have existed if a part payment could be made and suit to recover that part payment then instituted. From these two premises it is concluded that Congress has considered that there was no right to resort to the district court unless the entire tax had been paid.

to ask the Government when and by what statute did Congress impose these restrictions on jurisdiction.

Certainly restrictions on jurisdiction of the sort urged by the Government could not be found in Section 7422(a) of the Internal Revenue Code of 1954,[3] which merely sets out the requirement that a claim must be filed as a condition to bringing suit. As a matter of fact, Section 7422(a) and the other provisions of the Internal Revenue Code of 1954 setting out the procedures regarding claims for refund and the statutory prerequisites to suit clearly reflect a Congressional intent that the words of the jurisdictional statute be given their plain and literal meaning.[4]

Section 7422(a) provides that no suit "for the recovery of any internal revenue tax . . . , or of any sum alleged to have been excessive . . ." may be brought until a claim for refund has been duly filed in accordance with the law and regulations. The undeniable tie between *the claim* and *the suit* is emphasized by the fact that the suit is confined to the grounds set out in the claim.[5]

The claim contemplated by Section 7422(a) is one filed in accordance with the provisions of Section 6511 in which it is made doubly clear that no payment can be refunded unless a claim is filed within the prescribed statutory period—in this case within two years from the date of payment. Thus, Section 6511 requires the filing of a claim for refund of a partial payment in order to avoid the bar of the statute. Where such claim for refund is rejected, Section 6532(a)(1) bars recovery of the payment in any suit brought more than two years from rejection.

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[3] Derived from Rev. Stat. § 3226 (1875).

[4] Int. Rev. Code of 1954, §§ 6511(a), (b), 6532(a)(1), 7422(a), which are set forth in the Appendix, *infra*.

[5] U.S. Treas. Reg., § 301.6402-2 (1954); *United States* v. *Andrews*, 302 U.S. 517; *United States* v. *Garbutt Oil Co.*, 302 U.S. 528.

If by bringing a suit to recover a part payment the taxpayer could effectively stay the collection of the balance of the tax until after his suit had been determined, the second promise of the argument might be correct but in view of the admitted remedies open to the Commissioner for the collection of the tax, it is clear that this is not the case. Therefore, a taxpayer who had paid only a part of his tax could not effectively bar the complete collection thereof except by a lack of funds or property out of which to satisfy the obligation. In the usual case, then, the making of a token payment and suit to recover would not be a bar to collection and before the suit could be brought to a successful conclusion, the taxpayer might have been the victim of a forced sale of his property with all the same hardships mentioned by the committee in its report.

The practical situation that confronted Congress was therefore that in the usual case full payment of the tax was necessary in order to contest the liability and it was this usual case that concerned Congress and caused it to adopt the appeal provisions. There is no basis for the contention that Congress thereby demonstrated that no right of part payment and suit for recovery existed under the then applicable law. Congress, in recognizing the existence of a hardship because of the lack of appeal provisions prior to collection of the tax, was merely considering the practical situation and seeking to relieve the hardship resulting in the ordinary case. There is nothing in that action constituting a legislative construction of the statutes relating to suits to recover taxes.

A taxpayer requiring an extended time to pay an assessment must, if he considers any payment excessive, protect himself by filing a timely claim for refund of that particular payment. Upon the rejection of his claim, he has only two years within which to sue. If he were unable to pay the full assessment within this two year period, the Government's theory would forever bar him from recovering his earlier payment.[6]

The Government's departure from the plain language of the statute would attribute to Congress the intent on the one hand to deny this taxpayer the right to sue upon his claim for refund, and on the other hand to require him to sue within two years or be barred by the statute of limitations. Certainly, the literal meaning of a statute should not be disregarded where to do so produces such an incongruity. Having provided that this suit could not be brought after two years from rejection, Congress undeniably contemplated that it could be brought within such period.

2. There is no basis for the Government's repeated assumptions that this suit in some way restrains collection of the balance of the assessment.

The Government makes the surprising statement that the creation of the Board of Tax Appeals is "explainable only on the assumption that the taxpayer was obliged under the statutes authorizing refund suits to pay the entire tax before bringing suit for refund" (Br. 14). The Board of Tax Appeals (now the Tax Court) was created to permit restraint of assessment and collection of an asserted deficiency where

[6] See *Hanchett* v. *Shaughnessy*, 126 F. Supp. 769 (N.D.N.Y.), where a taxpayer made payments of $4100 on an assessment of $10,536.96, and arranged to pay the balance in monthly installments over a period of approximately six years. Claim for refund of the $4100 was filed and rejected, and suit was brought to recover that amount. Long before the last payment the statutory period for bringing suit to recover the first payments would have expired.

CONCLUSION

The statute conferring jurisdiction appears plain. It allows suit in the district court or court of claims to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." It allows such suit to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." We see no reason for this Court to construe the statute in any way different from the majority of the court in the *Bushmiaer* case, where it was held to be "positive, plain and unambiguous." The court below has read something into the statute which Congress did not intend and has in part justified this by reference to a subsequent law creating a right of appeal before the tax becomes fixed. Such construction of the effect of this later law is not justified by its history and no reason exists why the law conferring jurisdiction upon the district courts should not be liberally interpreted to the end that the United States be readily accessible to suit by its citizens in courts convenient to those citizens.

We therefore submit that the United States District Court for the District of Wyoming did have jurisdiction of the cause and that the judgment of the United States Court of Appeals for the Tenth Circuit holding that the cause should be dismissed for lack of jurisdiction is erroneous and that this Court should reverse such judgment and remand the cause to the Court of Appeals with instructions to consider the appeal from the United States District Court upon the merits.

Respectfully submitted,

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any overpayment is implicit in certain earlier opinions of this Court (... 9-14). Not a single one of those opinions, however, contains the slightest suggestion that the Court was even remotely considering the case where part of the assessment had been paid.

Taxpayer's original brief discussed (Br. 7-8) the irrelevance of the statements in the following cases relied upon in the opinion below; *Cheatham* v. *United States* 92 U.S. 85; *Kings County Savings Institution* v. *Blair*, 116 U.S. 200; *Dodge* v. *Osborn*, 240 U.S. 118; *Graham* v. *Dupont*, 262 U.S. 234; *United States* v. *Jefferson Elec. Co.*, 291 U.S. 386; *Dobson* v. *Commissioner*, 320 U.S. 489; *Phillips* v. *Commissioner*, 283 U.S. 589.

Nothing in the additional cases cited by the Government supports its position. Taxpayer, of course, has no quarrel with the doctrine, "pay first and litigate later," enunciated in the concurring opinion in *Allen* v. *Regents*, 304 U.S. 439, 456; or the statement in *Bull* v. *United States*, 295 U.S. 247, 260, that "payment precedes defense";[8] or similar statements made in denying an injunction against collection of taxes in *Bailey* v. *George*, 259 U.S. 16. These statements do not deal with how much must be paid and in no way support the Government's inference that "the entire tax, and not merely a token amount, must be paid" (Br. 13). Taxpayer's position, moreover, is supported by the holding

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[8] The *Bull* case was an unfortunate selection for the Government, for in that case the Supreme Court said: "While here the money was taken through mistake without any element of fraud, the injust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Nat. Bank Case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred, is immaterial . . . .'" 295 U.S. at 261. See also *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32; *United States* v. *Jefferson Elec. Co.*, 291 U.S. 386, 402-03; *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379.